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No. 89-9

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

HAMMER DEROBURT,
Petitioner,

v.

GANNETT CO., INC., and GUAM PUBLICATIONS, INC.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF IN OPPOSITION

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LIST OF PARTIES TO THE PROCEEDING

The caption of the case in this Court contains the names of all parties. Gannett Co., Inc. has no subsidiaries other than wholly-owned subsidiaries, except a majority interest in Hawaii Newspaper Agency, Inc. Guam Publications, Inc. is a wholly-owned subsidiary of Gannett Pacific Corporation, which is in turn a wholly-owned subsidiary of Gannett Co., Inc. Guam Publications, Inc. has no subsidiaries other than wholly-owned subsidiaries; and has as its affiliates the other subsidiaries of Gannett Co., Inc.

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BRIEF IN OPPOSITION

Respondents respectfully request this Court to deny the petition for writ of certiorari which seeks review of the decision of the United States Court of Appeals for the Ninth Circuit, reported at 859 F.2d 714 (1988).

COUNTERSTATEMENT OF THE CASE

This is a libel action brought by petitioner Hammer DeRoburt, President of the independent Republic of Nauru, an island republic in the South Pacific. Petitioner sought 40 million dollars as a result of two 1978 newspaper articles, published in Guam by respondent Guam Publications, Inc. The District Court granted a directed verdict at the close of the evidence in favor of Gannett Co., Inc., and the jury found for Guam Publications, Inc., determining that the first article had not been published

with actual malice, and that the second article did not defame petitioner.[1]

A. The Newspaper Article

The article at issue (CR 1, Exh. A) reported that Nauru had lent $600,000 to a political group located in the Marshall Islands. The article also stated that petitioner, Nauru's President at the time the article was written, had approved the loan and had personally delivered the check; that the loan was the second of two $600,000 loans made by Nauru to the Marshall Islands in a four-year period; and that the earlier loan had been declared illegal by governmental authorities.

B. History of the Case

Petitioner sued in 1978. The gist of petitioner's claim was that the article defamed him by improperly linking him to the issuance of a "secret" and "illegal" 1978 loan (CR 497). Petitioner did not challenge the loan's secrecy or illegality (RT 3592-93, 4076, 4109-10); nor did he deny his personal involvement in the earlier loan that was deemed illegal. Rather, petitioner claimed falsity only in that he did not participate in issuing the 1978 loan; his claim, in effect, was one of "mistaken identity." (CR 497; *DeRobart v. Gannett Co., Inc.*, 733 F.2d 701, 704 (9th Cir. 1984), *cert. denied*, 469 U.S. 1159 (1985)). His complaint included "claims 'founded on Nauruan law of libel,'" as well as claims founded upon American libel law principles, "replete with the words 'actual malice' and 'reckless disregard'." *DeRobart v. Gannett Co., Inc.*, 83 F.R.D. 574, 576 (D. Haw. 1979). Petitioner also sought attorneys' fees under Nauru law. In resolving the choice

[1] Although petitioner unjustly accuses both articles of being published in the tradition of "yellow journalism" (Petition at 3), the jury found one of them to be non-defamatory. On appeal, petitioner did not challenge the jury's verdict concerning the second article. The second article is thus irrelevant to the pending petition.

of law question, the District Court concluded that "application of the libel law of Nauru together with the First Amendment safeguards of *New York Times v. Sullivan* and its progeny would provide a satisfactory accommodation of the relevant policies of this forum." *DeRoburt*, 83 F.R.D. at 580.

On October 13, 1982, the District Court dismissed petitioner's third amended complaint based upon the "act of state" doctrine. *DeRoburt v. Gannett Co., Inc.*, 548 F. Supp. 1370 (D. Haw. 1982). One month later, the District Court denied petitioner's motion to reconsider the dismissal, and refused to permit petitioner to file a fourth amended complaint. *DeRoburt v. Gannett Co., Inc.*, 551 F. Supp. 973 (D. Haw. 1982). The Court of Appeals upheld the dismissal of the third amended complaint as "necessary and correct." *DeRoburt*, 733 F.2d at 703.[2] The court found, however, that the proposed fourth amended complaint was not necessarily precluded by the "act of state" doctrine, and authorized petitioner to file it. *Id.* at 704.[3] This Court denied respondents' petition for a writ of certiorari. 469 U.S. 1159 (1985).

Following remand, a jury trial (based upon a fifth amended complaint, which specifically alleged that the articles were written and published with "actual malice," (CR 497)) took place in 1985. The District Court directed a verdict in favor of Gannett Co., Inc., holding that it had no role in the publication of the articles at issue. The jury rendered its verdict in favor of defendant Guam Publications, Inc.[4]

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[2] Petitioner belittles respondents' successful motion to dismiss as a "digression." Petition at 8.

[3] Judge Chambers now has recently expressed some doubts about the Court of Appeals' "act of state" decision in this case. (A-6, A-7).

[4] Petitioner mischaracterizes the jury's findings of falsity and defamatory meaning as its *verdict* (Petition at 10). The only *verdict* rendered by the jury was unanimously in favor of respondent (CR 605).

Thereafter, petitioner appealed to the Court of Appeals. Petitioner argued on appeal that the District Court erroneously failed to charge the jury concerning the source presumption, and that admission of evidence of confidential sources at trial was error.[5] In an opinion dated October 11, 1988, the Court of Appeals affirmed the judgment of the District Court in all respects. The Court of Appeals determined that petitioner's arguments on appeal were wholly inconsistent with and thus waived by his trial strategy, which involved a conscious decision by petitioner "to present his case in a manner inconsistent with a theory of no sources." (A-4). The Court of Appeals then concluded "[f]or the district court judge to then instruct the jury that it should conclusively presume that there were no sources would have been contrary to the evidence presented at trial by both parties and contrary to the truth." (A-5). The Court of Appeals declined, without opinion, to rehear the case *en banc*. *DeRoburt v. Gannett Co., Inc.*, No. 85-2888, slip op. (9th Cir. Apr. 6, 1989).

REASONS WHY THE PETITION SHOULD BE DENIED

THIS CASE DOES NOT PRESENT SPECIAL OR IMPORTANT QUESTIONS MERITING THIS COURT'S EXERCISE OF DISCRETION

Petitioner has articulated no viable reason why this Court should grant review. No conflict exists in the courts of appeal, there is no question presented which has been left unsettled by this Court, and there was no decision below which conflicts with an applicable decision of this Court. Instead, petitioner seeks to have this Court reconsider a twenty-five year old established principle of constitutional law, and second-guess the District Court's

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[5] At trial, petitioner neither requested a "source presumption" instruction nor excepted to the instruction which was given (A-4; RT 4384-88, 4451).

exercise of discretion on a pre-trial discovery issue. As is demonstrated below, neither issue is fairly presented by the petition.

A. Petitioner Waived Any Objection to the Application of the "New York Times" Rule

Petitioner urges this Court to reconsider and overrule *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964). In the alternative, petitioner urges the Court to modify *New York Times* to shift the burden of proving "actual malice" to the defendant. These issues were never raised before in this case, nor were they considered by the District Court or by the Court of Appeals. Consequently, they are not properly before this Court and should not be considered. *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *Canton v. Harris*, 489 U.S. —— ,——, 57 U.S.L.W. 4270, 4272 n.5 (February 28, 1989); *Springfield, Inc. v. Kibbe*, 480 U.S. 257 (1987); *Delta Airlines, Inc. v. August*, 450 U.S. 346, 362 (1981).

Nor was petitioner's failure to raise his current objection to the *New York Times* decision an oversight. Rather, petitioner consciously embraced the actual malice standard as part of a deliberate trial strategy. Petitioner's current position is thus totally inconsistent with his tactical trial plan.

1. *Petitioner Waived His Arguments Concerning Actual Malice*

Petitioner's ready acceptance of the actual malice standard was obvious before and during trial. Petitioner's complaint alleged that the news articles were "written by their respective authors and published by Defendants with actual malice, that is, with actual knowledge of their falsity and/or with reckless disregard for whether they were false or not" (CR 497 ¶ 18), and petitioner readily sought to prove this element at trial.

Moreover, petitioner did not request a jury instruction consistent with his current theory. In fact, petitioner requested an instruction on actual malice "suggesting not only the use of the [New York] Times v. Sullivan, but amplification by the court in terms of the serious doubt expression of one of the progeny of New York Times versus Sullivan" (Tr. 9/10/85, p. 54). Petitioner submitted a request setting forth the actual malice standard in considerable detail, which the District Court substantially adopted:

Petitioner's Request (CR 595)

"Actual malice" means that the defendant published the statements with knowledge that they were false, or with reckless disregard for whether or not they were true or false.

* * * *

Actual malice is a legal term which you must not confuse with more common definitions of malice, such as ill will or hatred. Plaintiff cannot prevail merely by proving that the defendant was motivated by ill will, prejudice, hostility, hatred, contempt, or even a desire to injure.

* * * *

As I have stated, the plaintiff can establish actual malice by proving, with respect to any false, defamatory statement you find, that a responsible employee of defendant published the statement with knowledge of its falsity, or with a reckless disregard for its falsity. These two types of actual malice represent different degrees of awareness that an individual or individuals may have as to a statements' [sic] falsity.

Court's Charge (CR 600)

"Actual malice" means that the defendant published the statements with knowledge that they were false, or with reckless disregard for whether or not the statements were true or false.

* * * *

"Actual malice" is a legal term which you must not confuse with more common definitions of malice, such as ill will or hatred. Plaintiff cannot prevail by proving only that the defendant was motivated by ill will, prejudice, hostility, hatred, contempt, or even desire to injure.

* * * *

In defining "actual malice" above, I have stated that plaintiff may establish actual malice by proving that any false, defamatory statement was published with knowledge of its falsity, or with a reckless disregard for its truth or falsity. These two types of actual malice represent different degrees of awareness that an individual may have as to a statement's falsity.

Petitioner also submitted a charge on burden of proof, which placed the burden squarely on him:

Petitioner's Request (CR 595)	*Court's Charge* (CR 600)
The third element which *plaintiff must prove* is that the defendant acted with "actual malice" in publishing the articles . . . *A public official plaintiff has the burden of proving actual malice by clear and convincing proof,* as I have defined that term for you (emphasis supplied).	*Third,* Hammer DeRoburt must prove by *clear and convincing evidence* that the statements of fact about which he complains were published with *actual malice* (emphasis in original).

* * * * * * * *

Petitioner neither requested an instruction consistent with the points raised in his petition, nor excepted to the instruction which was given (RT 4384-88). The law of *this* case was as it was charged, without objection, at trial. Thus, petitioner's belated challenge should not be considered. *See* Fed. R. Civ. P. 51; *Kibbe*, 480 U.S. at 260 (dismissing writ of certiorari as improvidently granted where petitioner failed to object to jury instruction given below, had proposed own instruction to same effect, and had not raised issue before Court of Appeals).

Nor did petitioner raise his current argument in his appeal to the Ninth Circuit. Instead, he focused exclusively on the District Court's 1982 source presumption ruling and the modification of that discovery ruling in 1985. Petitioner never argued to the Court of Appeals that the *New York Times* decision should be overruled or that the burden of proof should be shifted to the defendant.

Given petitioner's wholesale adoption of the actual malice standard in the lower courts, it is remarkable that he argues for the first time to *this* Court that the actual malice rule should be re-examined. Petitioner's untimely assault on *New York Times* cannot, at this late stage, be allowed.

2. *This Case Does Not Present Any Need to Re-evaluate the Actual Malice Standard*

This case presents no reason why this Court should undertake a re-examination of a standard to which this Court has repeatedly reaffirmed its commitment. Just last term, this Court noted that "there is no question that public figure libel cases are controlled by the *New York Times* standard." *Harte-Hanks Communications, Inc. v. Connaughton*, 57 U.S.L.W. 4846, 4849 (June 22, 1989). As the Court also recently stated in *Hustler Magazine v. Falwell*, 485 U.S. ——, ——, 56 U.S.L.W. 4180, 4181 (February 24, 1988):

> Freedoms of expression require "breathing space." *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772 (1986) (quoting *New York Times*, 376 U.S., at 272). This breathing space is provided by a constitutional rule that allows public figures to recover for libel or defamation only when they can prove *both* that the statement was false and that the statement was made with the requisite level of culpability (emphasis in original).

The same considerations also justify the burden of proof allocation, as this Court first noted in *New York Times*, 376 U.S. at 271, and most recently affirmed in *Philadelphia Newspapers, Inc. v. Hepps*, 475 U.S. 767, 772-73 (1986):

> Authoritative interpretation of the First Amendment guarantees have consistently refused to recognize an exception for any test of truth—whether administered by judges, juries, or administrative officials—and especially, one that puts the burden of proving truth on the speaker.
>
> * * * *
>
> A rule compelling the critic of official conduct to guarantee the truth of all his factual assertions—and to do so on pain of libel judgments virtually unlimited in amount—leads to . . . "self-censorship." . . .

> Under such a rule, would-be critics of official conduct may be deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so.

If there is any type of fact situation which justifies the actual malice standard, it is certainly the one presented by this libel case. It was brought by the political leader of a foreign country, whose suit has been (and presumably still is) funded by his government. It sought $40 million in damages (exclusive of the millions sought by petitioner in attorneys' fees), enough to cripple one of the few independent newspapers in Micronesia. Throughout the lawsuit, petitioner sought to impose the law of a foreign land upon an American newspaper, as he challenged an article that described his international political activities in a regime just emerging into self-governance. Applying the actual malice rule to this case is not "merely a 'blind application of the *New York Times* standard . . ., it reflects [the Court's] considered judgment that such a standard is necessary to give adequate 'breathing space' to the freedoms protected by the First Amendment." *Hustler Magazine*, 485 U.S. at ——, 56 U.S.L.W. at 4182.

B. The Court Below Correctly Concluded That Petitioner Waived the Source Presumption Arguments He Now Asserts

Petitioner offers little argument or authority in challenging the decisions below, except conclusory statements that the District Court abused its discretion in imposing its modified trial sanctions, and that the Court of Appeals erred in affirming judgment in favor of respondents. Although the District Court's September 17, 1985 order was a reasonable exercise of its broad discretion, this Court need not consider this point. As the Court of Appeals correctly determined, petitioner's argument was wholly inconsistent with, and thus waived by, his trial strategy.

The article at issue was based on confidential sources (RT 2670-73). After this lawsuit began, petitioner moved to compel disclosure of the sources. *DeRoburt v. Gannett Co., Inc.*, 507 F. Supp. 880, 882 (D. Haw. 1981). In support of his motion, petitioner sought to demonstrate that he was unable by alternative means to discover the sources' identities, and listed the names of dozens of people purportedly contacted during 1979 and 1980 in an effort to identify the sources. The list did *not*, however, include the name of Ernest Milne—the only official Nauru representative on Saipan (the island upon which the reporter was located when he prepared and wrote the article at issue) (Tr. 8/29/85, pp. 5-8; CR 42, 136, 137).[6] Nor did it include the name of Jerry Kramer, who it was later revealed, had "long in advance" of 1980 or 1981 told petitioner's attorney that he had supplied information about the loan to the reporter (RT 3055-58, 3060-64).

On August 21, 1985, petitioner's attorney Allen told respondents' attorney that one of the confidential "sources" had died on August 17, 1985 (CR 525, Lucan affidavit ¶ 2).[7] Inquiry on Saipan by the news reporter, at defense counsel's request, confirmed that petitioner's attorney's information was correct (CR 525, Uludong

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[6] In his Petition to this Court, plaintiff states that "one of those interviewed was Mr. Milne, who expressly denied being a source." Petition at 10. This statement is *false*. Petitioner's counsel George Allen specifically omitted Milne's name from the list of people he told the District Court he had interviewed to determine whether they were the confidential sources for these stories—a list which included attorney Allen's infant children, who denied they were the confidential sources!

[7] Months earlier, petitioner's attorney had informally boasted to defense attorneys that he knew the identity of one of the newspaper's confidential sources (CR 525, McCrory Affidavit ¶ 2, Lucan Affidavit ¶ 4). However, because petitioner's attorney boasts were inconsistent with his prior representations to the District Court that he did *not* know the sources' names, the defense attorneys to whom he had bragged (who themselves did not know the identity of the sources) disregarded his claims to knowledge.

affidavit ¶ 2; RT 2679-82). After concluding that "a basic journalistic principle" was being "twisted and used against [him] and the *Pacific Daily News*" in this litigation (CR 525, Uludong affidavit ¶ 8), the reporter publicly confirmed the identity of the source to be Ernest Milne ("Source A"), which apparently had been known to petitioner's attorney for some time (RT 2682-86).

On September 16, 1985, petitioner's lawyers made yet another surprise disclosure. After seven years of litigation, they revealed that they had suddenly "discovered" the identity of the second source, Jerry Kramer ("Source B") (Tr. 9/16/85, pp. 1, 4-5). Testimony at trial established that petitioner's counsel apparently had known his name and his status as a confidential source since as early as 1980 (thus, *before* the District Court's 1981 order) (RT 3055-58, 3060-64).

The District Court, relying on the untrue representations of petitioner's attorneys that they had "made every effort to determine the identities of Gannett's sources but to no avail" (CR 136, p. 20), had earlier ordered disclosure of the sources. If not disclosed, the District Court directed the creation of an artificial "presumption that defendants had no sources, which presumption may be removed by disclosure of the sources within a reasonable time before trial." *DeRoburt*, 507 F.Supp. at 887. In 1982, with trial then approaching, the Court stated that the presumption would become absolute, except that respondents could move for reconsideration (CR 247).

The startling revelation of petitioner's attorney on August 21, 1985 that, unknown to the defense, a confidential source had died four days earlier, triggered respondents' motion to modify the District Court's 1982 discovery sanction (CR 525). On September 17, 1985, the District Court (1) ordered that petitioner was entitled to a rebuttable presumption that "Source A" was not as represented by respondents; (2) precluded respondents from referring to or introducing evidence of "Source B;"

and (3) granted petitioner an absolute presumption that "Source B" did not exist (CR 569, pp. 3-4). It was this severe sanction which petitioner's attorneys eschewed in favor of pursuing their desired strategy to "call witnesses and . . . prove [the article is] a lie" (Tr. 9/16/85, p. 20), thereby seeking a higher damage verdict if they were successful.

Petitioner's attorneys evolved that strategy during a series of pretrial conferences between August 28 and September 17, 1985, during which they specifically represented to the District Court their deliberate intention to abandon the 'no source" presumption and proceed under a different trial theory. Thus, although on August 28 petitioner's trial attorneys sought an instruction to the jury presuming no sources, at trial they specifically abandoned an interest in any such presumption instruction. Moreover, although on August 28 petitioner's trial lawyers seemed to oppose the admission at trial of evidence concerning respondents' confidential sources, during trial it was petitioner, *not respondents*, who offered evidence as to the identity of both "Source A" and "Source B;" and it was petitioner, *not respondents*, who offered evidence concerning the earlier refusal of respondents to disclose those sources. At no point after the trial began did petitioner's lawyers either object to the admission of evidence of no sources, or seek to ressurrect the "no source" instruction.

Petitioner's choice of this trial strategy was knowing and voluntary. Following the death of "Source A" (who could no longer support the defense), and the purportedly recent "discovery" of "Source B" (who would contradict the defense), petitioner's trial attorneys obviously believed they had the ability to persuade the jury that the reporter was a liar by foregoing the presumption and confronting him with "Source B" (who denied his source-status). The decision to let all the facts hang "out in the open," (Tr. 9/16/85, p. 17), and thus to forego any presumption in-

struction or preclusion order, was a calculated tactic designed to enhance petitioner's liability and damages case.

The Court of Appeals correctly concluded that "before and during trial, plaintiff's counsel chose to present his case in a manner inconsistent with a theory of no sources" (A-4). Petitioner's trial strategy, which affirmatively and deliberately removed the source issue from this case, waived the arguments now made on his behalf. Petitioner's appellate attorneys simply second-guess petitioner's trial attorneys' trial decisions. The Court of Appeals found that petitioner's *current* legal position was abandoned by petitioner at trial; petitioner faces the same barrier here and cannot surmount it.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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